Held & Held Masonry, Inc. *and* Marty Canales. Case 7–CA–39551

August 2, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

On March 1, 1999, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Held & Held Masonry, Inc., Tipton, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified below.

Substitute the attached notice for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's findings, we disavow, as speculative, the judge's statement that "part of [Office Manager] Walter's discomfort was undoubtedly due to the fact that she had made an error in Canales' paycheck quite apart from the overtime matter."

Further, we do not rely on the judge's statement that "[b]y definition, half of all laborers are less than average, yet surely Respondent does not terminate them . . . ."

Chairman Truesdale and Member Hurtgen would leave to compliance issues relating to Respondent's obligation to reinstate and make whole Canales.

Member Brame also does not rely on the judge's faulting the Respondent for its failure to provide "documentary evidence" for its claim that employees were fired in the past for poor work performance, or to provide "supporting documentation" for its claim that an employee had been laid off because he was argumentative and didn't work in a safe manner. In his view, the absence of "documentary evidence" from this small-sized company is not a consideration in this case.

Further, without passing on the validity of *Dean General Contractors*, 285 NLRB 573 (1987), cited by the judge in the remedy section of his decision, Member Brame would not in any event apply the remedy approved in that case in circumstances where, as here, the discriminatee is a recent hire. See, e.g., *Cash Equipment Rental*, 326 NLRB 1117 fn. 2 (1998).

[2] The General Counsel, in answering brief, requests that the Board delete the word "**supporting**" that was inadvertently added in the recommended notice but which was not in the recommended Order. We shall modify the notice, as requested by the General Counsel.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for asserting a claim pursuant to a collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Marty Canales full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Marty Canales whole for any loss of earnings and other benefits resulting from his discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Marty Canales, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

HELD & HELD MASONRY, INC.

Margrette Taylor, Esq., for the General Counsel.
Steven H. Schwartz, Esq., of Southfield, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Detroit, Michigan, on January 7, 1999. The charge was filed February 28, 1997,[1] and the complaint issued June 25, 1998. The complaint alleges that Held & Held Masonry, Inc. (Respondent) violated Section 8(a)(1) of the Act by discharging its employee Marty Canales because he had asserted a right under a collective-bargaining agreement. Respondent filed an answer that admitted the allegations concerning the filing and service of the charge, jurisdiction, labor organization status,

[1] All dates are in 1997 unless otherwise indicated.

agency and supervisory status, and the existence of a collective-bargaining agreement. Respondent denied the substantive allegation of the complaint and claimed that Canales had asserted his contractual claim in an inappropriate manner and that he was discharged for reasons unrelated to his assertion of a contractual claim.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent,[2] I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is a masonry contractor in the construction industry at its facility in Tipton, Michigan, where it annually purchases and receives goods valued in excess of $50,000 directly from points located outside the State of Michigan. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Laborers' International Union of North America, AFL–CIO, Local 334 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

As indicated, Respondent is engaged in the masonry business. Its president is Wayne Held (Held), who is in overall charge of the day-to-day operations. His brother, Keith Held, is part owner and works as a job foreman and truckdriver for Respondent. Held's wife, Willa, works in the office and takes care of the books. Respondent's operations are run from Held's home.

Respondent's business is somewhat seasonal in nature as it employs as many as 20, but as few as 6, employees. Three classifications of employees typically work at a jobsite. Working foremen coordinate and oversee the project; bricklayers, who are skilled tradesmen, lay the brick; and laborers, who assist the bricklayers by, among other things, bringing supplies and materials so that the bricklayers can work efficiently.

Respondent has collective-bargaining agreements with several labor organizations, including the Union. This contract provides that overtime pay will be paid for worked performed on Saturdays. The contract also provides for a grievance-arbitration procedure.

B. Canales' Employment Record

Charles Blakeman, a masonry foreman and bricklayer, told Canales that Respondent was hiring and Canales accepted the offer of employment. Canales was hired on about February 10 and began working on February 13; he worked as a laborer. Canales worked at several sites before his termination. Canales worked Thursday, Friday, and Saturday, during his first week of employment. Notwithstanding the contractual overtime provision described above, Respondent regarded the Saturday work as a "make-up" day for the time during the regular 40-hour workweek that Canales had not worked. This was apparently in keeping with the practice with other recognized units of employees. On Friday, February 21, Canales arrived for work at a jobsite but left with the bricklayers after an hour because it was raining. He left with Blakeman, with whom he shared transportation to and from the jobsites. Notwithstanding the inclement conditions however, the other laborers worked that day.

Canales was never warned or disciplined for any reason prior his termination.

C. The Discharge

On Wednesday, February 26, Canales received his paycheck and he noticed that he did not receive the overtime rate for the hours he had worked on Saturday. Canales called the Union who confirmed that he was entitled to the overtime rate. On February 27, Canales called Respondent's office and spoke to Christina Walters, Respondent's office manager. Canales told her that there was a mistake on his check; that he did not receive overtime pay for Saturday. Actually, two errors had been made in Canales' paycheck. The first was the overtime matter, described above, and the second was a smaller error made by Walters. Walters said that she would look into the matter. After a short wait Walters said that she would have to check it out with Held. Canales testified that during this conversation he was not rude nor did he raise his voice; he also testified that Walters gave no indication that she was upset by the call. I have considered the testimony of Walters that Canales was rude and that she was upset as a result of the conversation with him. However, when I questioned Walters as to specifically what Canales said that made her feel that he had been rude, she testified only that Canales was insistent that the error in his paycheck be fixed immediately and that he get his check. I have little doubt that Walters was in fact upset as a result of the conversation but I conclude that the evidence is insufficient that show objectively that Canales was rude or intimidating as opposed to being insistent. Instead, part of Walters' discomfort was undoubtedly due to the fact that she had made an error in Canales' paycheck quite apart from the overtime matter.

Walters then paged Held and reported the conversation to him. Walters seemed to be upset and Held told her to calm down, that they would correct the error and it was of no great concern. The testimony is unclear as to which error they were referring to. Held then spoke to his wife about the matter.

About 20 minutes later Canales received a call from Held. Canales asked whether Held had seen the overtime mistake in his paycheck. Held answered that he was a member of a masonry association and that overtime is not paid on Saturday if it is worked as a "make-up" day for work missed during the 40-hour workweek. Canales replied that he belonged to the Union and they do not have makeup days and Saturday was still paid at the overtime rate. Held then said that Canales could not work on Saturdays anymore and that Canales could not work overtime anymore. Canales said okay. Held then said that Canales did not work there anymore.[3] At no time was Canales

[2] The brief filed by the General Counsel was not timely served on the parties; it has not been considered.

[3] These facts are based on the testimony of Canales. I have considered the testimony of Held that he did not call Canales until later that evening, that he told Canales that he should first have discussed the matter with his foreman and that he should not have belittled Walters, and that Held and his brother had already made the decision to lay off Canales on Friday but then decided to lay him off at once. Much of this testimony only serves to strengthen the General Counsel's case. However, I do not find it to be credible. First, based on my observation of the demeanor of the witnesses, I conclude that Canales' testimony is more credible in this regard. Also, as noted elsewhere in this decision there is no corroboration concerning any firm decision made to lay off Canales prior to the time he called Walters. Importantly, in the state-

asked about his version of the conversation with Walters before he was laid off.

About an hour and a half later Held returned to the office and spoke with Willa Held and Walters.[4] Thereafter Canales received the overtime and other pay that was missing from his check.

D. Analysis

The analysis set forth in *Wright Line*[5] governs the determination of whether Respondent violated Section 8(a) (1) of the Act by discharging Canales. The Board has restated that analysis as follows:

> Under *Wright Line*, the General Counsel must make a prima facie showing that the employee's protected union activity was a motivating factor in the decision to discharge him. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in absence of the protected union activity.[7] An employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.[8] Furthermore, if an employer does not assert any business reason, other than one found to be pretextual by the judge, then the employer has not shown that it would have fired the employee for a lawful, nondiscriminatory reason.[9] *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400 (1983).

[7] *NLRB v. Transportation Management Corp*., 462 U.S. 393, 400 (1983).

[8] See *GSX Corp. v. NLRB,* 918 F. 2d 1351, 1357 (8th Cir. 1990) ("By asserting a legitimate reason for its decision and showing by a preponderance of the evidence that the legitimate reason would have brought about the same result even without the illegal motivation, an employer can establish an affirmative defense to the discrimination charge.")

[9] See *Aero Metal Forms*, 310 NLRB 397, 399 fn. 14 (1993).

T & J Trucking Co., 316 NLRB 771 (1995). This was further clarified in *Manno Electric*, 321 NLRB 278 (1996).

Applying this analysis to the facts of this case, I conclude that Canales' verbal complaint concerning his overtime pay is activity protected by the Act. *NLRB v. City Disposal Systems,* 465 U.S. 822 (1984); *Prime Time Shuttle,* 314 NLRB 838, 841 (1994). Because I have credited Canales' testimony that he was not rude in his dealings with Walters, I conclude that Canales did not lose the protection of the Act by the manner in which he asserted his contractual claim. It should be noted that even if Canales had been demanding in his conversation with Walters, still he would not have lost the protection of the Act. *Paper Board Cores,* 292 NLRB 995 (1989). The cases cited by Respondent in its brief are clearly distinguishable inasmuch as they involve conduct far more serious than that attributed to Canales in this case.

It is also clear that the General Counsel has met his initial burden. The undisputed facts show that Canales engaged in protected activity and Respondent had knowledge of this activity. Twenty minutes after he lodged his contractual claim, Canales received a telephone call at home from Held and, after discussing the claim, Canales was laid off. No specific reason was given Canales for the layoff. The timing and context of the layoff establish a strong case for the General Counsel. Indeed, the credited facts concerning the termination conversation provides direct evidence of unlawful motivation.[6]

Respondent argues that Canales was a poor employee in that he came to work late on occasion, he would not stay late, and on one occasion he refused to stay when other laborers worked. Held testified that he considered Canales to be "a less that average" laborer. Keith Held testified that Canales was "definitely not a hustler." However, this testimony by itself is of little assistance in resolving the issues in this. By definition, half of all laborers are less than average, yet surely Respondent does not terminate them; certainly this record does not support such a finding. Held also testified that there were times when observed that Canales was unable to keep pace with the bricklayers and thus caused inefficiency. However, there is no credible evidence that Canales was warned about this matter or that he was told that this was a reason for his termination.[7] Finally, Held testified in a conclusory fashion that in the past he terminated employees for poor work performance. It was not supported by with detail or documentary evidence from which a reasoned comparison could be made. This testimony falls far short of showing that Respondent would have laid off Canales even absent his complaint. Keith Held testified that he laid off an employee because that employee was argumentative and did not work in a safe manner. Here too there is an absence of detail and supporting documentation and thus this testimony is not persuasive.[8]

In its brief, Respondent bases its argument on facts that I have not credited; thus to that extent its argument must fail. In sum, I conclude that Respondent has failed to show that it would have laid off Canales even absent his protected activity. It follows that by Laying off Canales on February 27 Respondent violated Section 8(a)(1) of the Act.

Respondent also argues that Canales would have been laid off in any event when the project that he was working on ended about a month after his termination. However, matters such as this involving the construction industry are more appropriately resolved during compliance proceedings. *Holder Construction Co.,* 327 NLRB 326 (1998), citing *Dean General Contractors*, 285 NLRB 573 (1987).

ment of position submitted by Respondent during the investigation of this charge, there is no mention of any decision to lay off Canales prior to his complaint. Finally, as also described elsewhere in this decision, Held's testimony at times was exaggerated.

[4] Held's testimony that about 2 hours after the incident between Walters and Canales and after he had told Walters that matter could be solved, Walters was still "beet red, her eyes glazed over, nearly in tears" is obviously exaggerated to say the least

[5] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[6] Thus, the argument Respondent makes in its brief that there is an absence of animus is not persuasive.

[7] Held also testified that based on this, he and his brother had a conversation and decided to lay off Canales on Friday, February 28. However, this testimony is not corroborated by the testimony of Keith Held, nor is there any documentary evidence that such a decision was made and the termination process started prior to Canales' call to Walters. For these reasons, as well as my observation of Held's demeanor, I do not credit his testimony in this regard.

[8] For these reasons the testimony of Jason Seymour and William Samuels concerning their perceived faults in Canales' work habits is of little use in this case; I have concluded that Respondent did not rely on those alleged shortcomings in terminating Canales.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Marty Canales on February 27, 1997, because he asserted a claim pursuant to a collective-bargaining agreement, Respondent violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondent having discriminatorily discharged Canales, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). However, because Respondent is engaged in the construction industry, reinstatement and backpay issues may be refined during the compliance process. *Holder Construction Co.*, supra; *Dean General Contractors,* supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Held & Held Masonry, Inc., Tipton, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for asserting a claim pursuant to a collective-bargaining agreement.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Marty Canales full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Marty Canales whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Tipton, Michigan, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 27, 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."